IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1034 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAJESH J PANCHAL

Versus

STATE OF GUJARAT

Appearance:
MR VH DESAI for Petitioner
MR BD DESAI, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 19/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

In this appeal, which is filed under section 374 of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated August 20, 1993 rendered by the learned City Sessions Judge, Ahmedabad in Sessions Case No. 75/93 by which he is convicted of the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer R.I. for life.

2. The appellant was staying in Block No.D/15/117 of Nandanvan Apartments situated in Nava Vadaj, Ahmedabad with his father Jayendrakumar @ Maheshbhai K.Panchal, his mother Jashodaben and his brother Jignesh. The prosecution has claimed that the father of the appellant had extra-marital relations with one Nayanaben residing at Maninagar and because of these illicit relations, a daughter named Riddhi was born to Nayanaben on February 23, 1990. According to the prosecution, Nayanaben often used to come to Block No.D/15/117 and assert that she was lawfully wedded wife of Jayendrakumar. As per the case of the prosecution, the family members of Jayendrakumar including the appellant did not approve relations of Jayendrakumar with Nayanaben, which led to frequent quarrels and according to the prosecution, Jayendrakumar used to beat his wife and two sons. The prosecution has alleged that about two months before December 1, 1992, Nayanaben had left her daughter Riddhi at Block No.D/15/117 of Nandanvan Apartments, as she was attending a typing class and there was none to attend minor Riddhi. The prosecution has averred that on November 30, 1992 at about 9.45 P.M. the appellant and his mother asked the father of the appellant to take Riddhi to Maninagar where Nayanaben was residing, but father of the appellant firmly told the appellant and his mother that Riddhi would stay at Nandanvan Apartments only and beat them. It may be stated that the appellant was serving while prosecuting his studies in the college. According to the prosecution, on the date of incident i.e. December 1, 1992, again the appellant pleaded with his father to remove Riddhi from Nandanvan apartments, but the father did not budge and quarrelled with him. As per prosecution, because of quarrel, the appellant went out, but did not attend either service or college and came back to his house at about 12.00 noon and went to bed after taking meals. What is alleged by the prosecution is that in the evening at about 5.00 P.M., Jashodaben i.e. mother of the appellant had gone out to purchase vegetables; whereas Jignesh, who was younger brother of the appellant, was playing in the compound of apartment and father of the appellant was not at the house and

thus, the appellant was all alone with Riddhi at the house. The prosecution has claimed that the appellant was very much agitated because his father had kept a concubine, who had given birth to Riddhi and Nayanaben i.e. concubine was asking the appellant and his mother to find out their own way and therefore, at about 5.45 P.M. the appellant strangulated Riddhi to death and left the house. As per the case of the prosecution, when he came near Octroi Post of Nava Vadaj, he thought that he would be arrested by the police because arms of law are long and therefore, he went to Naranpura Police Station, Ahmedabad city and lodged First Information Report which was reduced into writing by Police Inspector Mr. Govindbhai Hirabhai Patel. After registration of F.I.R., investigation into the case was made by the Police Inspector and inquest on the dead body of the deceased was held. The dead body of the deceased was thereafter sent to Civil Hospital, Ahmedabad for autopsy where autopsy on the dead body was performed by Dr. Nayankumar Natvarlal Parikh. The investigating officer thereafter recorded statements of witnesses supposed to be acquainted with the facts and circumstances of the case. At the conclusion of the investigation, the respondent was chargesheeted of the offence punishable under section 302 of I.P.C. As the offence punishable under section 302 of I.P.C. is exclusively triable by Court of Sessions, the case was committed to the Court of learned City Sessions Judge, Ahmedabad for trial, where it was numbered as Sessions Case No. 75/93.

3. Charge for the offence punishable under section 302 I.P.C. was framed by the learned City Sessions Judge at Exh.4, which was read over and explained to the appellant. The appellant did not plead guilty to the charge and claimed to be tried. Therefore, in all six witnesses were examined by the prosecution to prove its case against the appellant. They were (i) Nayanaben J. Panchal as P.W.1 at Exh.8, (ii) Jashodaben J. Panchal as P.W.2 at Exh.9, (iii) Jignesh J. Panchal as P.W.3 at Exh.10, (iv) Lalitkumar Bhikhubhai Vora as P.W.4 at Exh.13, (v) Dr. Nayankumar N. Parikh as P.W.5 at Exh.14, and (vi) Police Inspector Mr. Govindbhai H. Patel as P.W.6 at Exh.16. Documentary evidence in the form of panchnama of place of occurrence, inquest report, postmortem notes prepared by Dr. Parikh, complaint filed by the appellant etc. was also produced by the prosecution to prove its case against the appellant. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing in the evidence against him and recorded his statement under section 313 of the Code of

Criminal Procedure. In his further statement which was recorded under section 313 of the code, the appellant denied the case of the prosecution. Though the appellant did not examine any witness in his defence, he submitted his written statement and claimed that at the time of incident, he was not present at his house and that he was innocent.

4. On appreciation of evidence adduced by the prosecution, learned City Sessions Judge held that it was proved by the prosecution that child Riddhi died a homicidal death on December 1, 1992 around 5.45 P.M. to 6.00 P.M. in Flat no.15 of Nandanvan Apartments situated near Nava Vadaj, Ahmedabad, which is residential house of the appellant. The learned Judge extensively referred to the evidence of prosecution witnesses and concluded that it was proved by the prosecution that the appellant and deceased Riddhi were the only persons present in Flat no.15 at 5.45 P.M. on December 1, 1992. The learned Judge further deduced that the prosecution was successful in proving that the appellant had at about 5.45 P.M. on December 1, 1992 committed murder of Riddhi by strangulating her. In view of the above-referred to conclusions, the learned Judge has convicted the appellant under section 302 I.P.C. and sentenced him to R.I. for life by judgment dated August 20, 1993, giving rise to present appeal.

5. Ms. Madhuben Sharma, learned counsel for the appellant after taking us through the entire evidence on record, submitted that as the prosecution has failed to establish the motive for commission of crime, the learned Judge was not justified in convicting the appellant of the offence punishable under section 302 I.P.C. According to the learned counsel, evidence on record does not establish beyond reasonable doubt that the appellant and deceased Riddhi were the only persons present in Flat no.15 at 5.45 P.M. on December 1, 1992 and as possibility of stranger having committed crime is not ruled out, atleast benefit of doubt ought to have been given to the appellant. What was stressed was that except the F.I.R. which was lodged by the appellant and which is hit in its entirety by section 25 of the Evidence Act, the prosecution has not lead cogent and reliable evidence to establish that the appellant had committed murder of deceased Riddhi and, therefore, the appeal should be accepted. The learned counsel referred to law on circumstantial evidence and claimed that as the circumstances sought to be relied upon by the prosecution are not established and the chain of evidence furnished by the circumstances which are proved, is not complete,

the appellant could not have been convicted under section 302 I.P.C. In the alternative, the learned counsel urged that at the time of commission of crime, the appellant was deprived of power of self-control because of nasty behaviour of his father as well as Nayanaben and as the murder was committed under grave and sudden provocation, Exception-I to Section 300 I.P.C. would be applicable and the offence committed by the appellant should be held to be one punishable under section 304 Part-I of I.P.C. In support of her submissions, learned counsel placed reliance on the decisions rendered in (1) Rajendrabahadur Singh v. State of M.P., 1990(2) Crimes, 288, (2) Jodha Khoda Rabari v. State of Gujarat, 1992 Criminal Law Reporter (Gujarat) 282, and (3) State of Gujarat v. Ishwarlal K. Shah, 1993(1) GCD 761 (Gujarat).

6. Mr. B.D.Desai, learned A.P.P. after referring to the evidence of prosecution witnesses and more particularly, evidence of witness Jignesh Jayendrakumar, asserted that it was proved by the prosecution beyond reasonable doubt that the appellant and deceased Riddhi were the only persons present in Flat No.15 at 5.45 P.M. on December 1, 1992. The learned counsel for the State submitted that confessional part of the F.I.R. lodged by the appellant is not admissible in evidence, but non-confessional part of the F.I.R. can be used against the appellant as evidence of conduct under section 8 of the Evidence Act, 1872, which indicates that the appellant had strong motive to commit the crime and that he was with deceased Riddhi in the Flat at about 5.45 P.M. on December 1, 1992. What was stressed was that the appellant had committed murder of deceased Riddhi, a child aged 3 years because he was nurturing a grudge against his father and Nayanaben and the circumstantial evidence on which the prosecution proposed to rely having been established and the chain of evidence being complete, the learned Judge did not commit any error in convicting the appellant under section 302 I.P.C. In answer to the alternative plea raised by the learned counsel for the appellant that the case would fall under Part-I of Section 304 I.P.C., the learned counsel for the State contended that no provocation worth the name was offered by the deceased to the appellant at all and, therefore, the case would fall within the ambit of section 302 I.P.C. and not within the ambit of Part-I of Section 304 I.P.C.

7. We have taken into consideration the submissions advanced at the Bar and reappreciated the evidence on record. The fact that deceased Riddhi, a child aged 3 years, died a homicidal death is not in dispute and is

proved beyond reasonable doubt by the evidence of Dr. Nayankumar N. Parikh, who had performed autopsy on dead body of Riddhi as well as by the contents of postmortem notes. The evidence of Dr. Parikh indicates that death of deceased Riddhi took place due to asphyxia resulting from strangulation. His evidence would further indicate that ligature mark was present on the neck. The injuries on the deceased are also noticed in the inquest report which was admitted in evidence by the learned City Sessions Judge with the consent of the parties. Thus, the finding that deceased Riddhi died a homicidal death being just and having been borne out from the evidence on record, is hereby upheld.

8. It is relevant to notice that the prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence regarding the incident is tendered before the Court. Admittedly, the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or, are, not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and

every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In Sharad v. State of Maharashtra, AIR 1984 SC 1622, after referring to earlier case-laws, the Supreme Court has summarised the conditions to be fulfilled in a case based on circumstantial evidence as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of a conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. If the aforesaid various conditions are fulfilled,only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts, called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and their relations to the facts of the particular case.

9. In the light of the above-referred to principles, we will now consider the question whether the case

against the appellant is proved or not. Mr. B.D.Desai, learned counsel for the State Government submitted that portion of statement relating to previous history made by the appellant in the First Information Report lodged by him should be taken into consideration while deciding the present appeal. What was emphasized by the learned counsel for the prosecution was that the relationship of the appellant with the deceased or motive for commission of crime etc. stated by the appellant in his F.I.R. do not amount to the confession of committing any crime and as those statements are non-confessional in nature, they can be used against the appellant under section 8 of the Evidence Act. Ms. Madhuben Sharma, learned counsel for the appellant on the other hand contended that the First Information Report lodged by the appellant is confessional in nature and as proof of confession is prohibited by section 25 of the Evidence Act, no part of confessional statement should be received in evidence, except to the extent it is permitted by section 27 of the Evidence Act. We have considered this aspect of the matter and we are of the opinion that the First Information Report lodged by the appellant being confessional in nature, cannot be used against the appellant. It frequently happens that persons after committing an offence proceed to the Police Station and report there the matter to the officers concerned, who take down such statements as the first information under section 154 of the Code of Criminal Procedure, 1973. By reason of the provisions contained in section 25 of the Evidence Act, such statements are inadmissible in evidence, if they are in the nature of confessions. The test of severability, namely, that if the part of report by the accused is properly severable from the strict confessional part, then the severable part could be tendered in evidence, in our view, is misleading and that the entire confessional statement is hit by section 25 of the Evidence Act and save and except as provided by section 27 of that Act and save and except the formal part identifying the accused as the maker of the report, no part of it can be tendered in evidence. The learned City Sessions Judge has dealt with this point in para-16 of the impugned judgment and save and except formal part identifying the accused as the maker of the report, has not admitted in evidence other part of the F.I.R. In our view, this is quite consistent with the law propounded on the subject by the Supreme Court and agreeing with the view taken by the learned City Sessions Judge, we hold that the First Information Report lodged by the appellant being confessional in nature, cannot be used against him.

10. The first circumstance which is sought to be

proved by the prosecution against the appellant is that at the time of incident, the family of the appellant consisted of himself, his father Jayendrakumar, mother Jashodaben and younger brother Jignesh. Witness Nayanaben J. Panchal, P.W.1, Exh.8 in her evidence before the Court has stated that Jayendrabhai Panchal, who is father of the appellant, was residing with his wife Jashodaben and two sons named Rajesh i.e. the appellant and Jignesh on 3rd floor of Nandanvan Apartments situated near Bhavsar Hostel. This statement made by Nayanaben is not challenged by the appellant in her cross-examination. Again, witness Jashodaben, P.W.2 Exh.9 has claimed in her evidence that she was staying at 3rd Floor of Nandanvan Apartments with her husband Jayendrabhai and two sons. She has also claimed that witness Nayanaben was also staying with her, but, Nayanaben has stated in her evidence that she was staying in Adhyashakti Flats situated at Maninagar with Jayendrabhai Panchal and, therefore, the claim made by Jashodaben that Nayanaben was also staying with her at Nandanvan Apartments, does not inspire confidence of the Court. Again, witness Jignesh J. Panchal, P.W.3 Exh.10 in his testimony before Court has stated that he was staying at Nandanvan Apartments with his mother Jashodaben, father Jayendrabhai and brother Rajesh i.e. the appellant. This assertion made by witness Jignesh is not challenged on behalf of the appellant during his cross-examination. In his statement under section 313 of the Code of Criminal Procedure, the appellant has admitted that he was staying in Flat no.15 of Nandanvan Apartments with his father Jayendrabhai, mother Jashodaben and younger brother Jignesh at the time of incident. On appreciation of evidence of prosecution witnesses, we are satisfied that the fact that at the time of incident, the family of the appellant consisted of himself, his parents as well as his brother Jignesh and all were staying in Flat No.15 of Nandanvan Apartments situated near Bhavsar Hostel, is proved beyond reasonable doubt.

11. The second circumstance, which is sought to be proved by the prosecution against the appellant, is that his father Jayendrabhai had illicit relations with Nayanaben and Nayanaben had given birth to an illegitimate child named Riddhi. Witness Nayanaben J. Panchal, P.W.1, Exh.8 has claimed in her evidence that she was staying with Jayendrabhai K. Panchal as his wife since 1987 in Adhyashakti Flats situated at Maninagar and during the subsistence of her marriage with Jayendrabhai, she had given birth to a child girl named Riddhi in the year 1991. However, in para-2 of her deposition, witness

Nayanaben has clearly stated that name of first wife of Jayendrabhai Panchal was Jashodaben and Jayendrabhai panchal had two sons through Jashodaben. The witness has also informed the Court that the first wife of Jayendrabhai i.e. Jashodaben was staying on the 3rd Floor of Nandanvan Apartments situated near Bhavsar Hostel with her two sons. The evidence of this witness would indicate that Jashodaben was lawfully wedded wife of Jayendrabhai. The record of the case does not indicate that Jayendrabhai Panchal had divorced Jashodaben and married witness Nayanaben. Witness Jashodaben P.W.2 Exh.9 has stated in her evidence that Nayanaben was staying with her in Flat No.15 of Nandanvan Apartments as her sister and she had no child at all. However, as she had not supported the prosecution case, the learned Additional Public Prosecutor had sought permission from the Court to treat her hostile to the prosecution and after obtaining permission, she was cross-examined by the learned A.P.P. In her cross-examination by learned A.P.P. witness Jashodaben has admitted that her husband Jayendrabhai had kept Nayanaben with him as his second wife and that Nayanaben had given birth to a daughter named Riddhi. She has also admitted that Nayanaben was residing in Maninagar area, but was visiting Nandanvan Apartments off and on. Further the appellant in his statement recorded under section 313 of the Code of Criminal Procedure has admitted that his father Jayendrabhai had extra-marital relations with Nayanaben and because of those illicit relations, baby girl named Riddhi was born. On overall appreciation of evidence on record,we are of the opinion that the prosecution is successful in establishing the fact that Jayendrabhai, who is father of the appellant, had illicit relations with Nayanaben and Nayanaben had given birth to a child girl named Riddhi out of wedlock.

12. The third circumstance, which is sought to be proved against the appellant is that about two months prior to the date of incident, Nayanaben had left minor Riddhi at Nandanvan Apartments in the custody and care of Jayendrabhai, who is father of the appellant and Jashodaben, who is mother of the appellant. Witness Nayanaben J. Panchal, P.W.1, Exh.8 has clearly stated in para-2 of her deposition that two months prior to the date of incident, she had left minor Riddhi in the custody and care of Jashodaben at Nandanvan Apartments, as she was attending a typing class. This part of the evidence of this witness is not challenged by the appellant at all. Further witness Jashodaben J. Panchal, P.W.2 Exh.9 in para-3 of her deposition during cross-examination by the learned A.P.P. has admitted

that some two months prior to December 1, 1992, Nayanaben had left minor Riddhi at Nandanvan Apartments. This assertion made by the witness is also not challenged on behalf of the appellant. It is pertinent to notice that witness Jignesh J. Panchal P.W.3 Exh.10 has stated in para-2 of his deposition that on December 1, 1992, deceased Riddhi was at Nandanvan Apartments, which is not challenged on behalf of the appellant at all. The appellant in his further statement recorded under section 313 of the Code of Criminal Procedure has accepted that on Labh Pancham day, Nayanaben had left Baby Riddhi at his house. Thus, in view of totality of the evidence adduced by the prosecution, we are satisfied that the prosecution has proved beyond reasonable doubt that on the date of incident, deceased Riddhi aged 3 years, was residing in Flat no.15 of Nandanvan Apartments, near Bhavsar Hostel with the appellant, his parents and his younger brother Jignesh.

13. The most incriminating circumstance, which is sought to be proved by the prosecution against the appellant is that at the time when murder of deceased Riddhi took place, the appellant was all alone in the house and had opportunity to commit the crime. Witness Nayanaben J. Panchal, P.W.1 Exh.8 has stated in her evidence that on learning about the death of deceased Riddhi, she had gone to Nandanvan Apartments after 10.00 P.M. on December 1, 1993 and had found the deceased lying dead on a carpet spread in one of the rooms of the Flat. The prosecution has not claimed that Nayanaben had any knowledge or information that at the time when the incident took place, the deceased was all alone in the company of the appellant and, therefore, her evidence is of no assistance or help to prosecution in proving the fact that the appellant was all alone in the Flat with minor Riddhi when the deceased was murdered and he had the opportunity to commit the crime. However, witness Jashodaben J. Panchal P.W.2 Exh.9 during her cross-examination by the learned A.P.P. has clearly stated that at the time when the deceased expired, she had gone out to purchase vegetables; whereas her younger son Jignesh was playing on the ground floor of the Flat. What is explained by her is that she had gone to purchase vegetables after ascertaining that deceased Riddhi was asleep. She has clearly maintained before the Court that she did not know as to what happened at the house during her absence when she had gone out to purchase vegetables, but on returning, found that the deceased was dead. We may state that this witness was not cross-examined at all by the appellant and, therefore, the claim made by the witness that at the time of incident she had gone out to

purchase vegetables and her younger son Jignesh was playing on the ground floor of the Flat, stands amply proved. Witness Jignesh J.Panchal P.W.3 Exh.10 has in no uncertain terms stated in para-2 of his deposition that on December 1, 1992, he had gone to attend his school at about 7.00 to 7.30 A.M. in the morning and during noon the appellant had come back home, as he was suffering from fever. This witness has clearly deposed before the Court that on that day he himself, his step sister Riddhi, his mother and the appellant were present in the house and he had left the home at about 5.15 P.M., as he wanted to play. What is claimed by this witness is that after he came down from his Flat for the purpose of playing, her mother had gone out for purchasing vegetables. We may state that the claim made by this witness in para-2 of his deposition stands accepted by the appellant, as this witness was not cross-examined on behalf of the appellant at all. The evidence of witness Jignesh unerringly establishes that at the time of incident, the appellant was all alone with deceased Riddhi in the Flat. Thus, the prosecution, in our view, has established that the appellant was all alone in the house with the deceased at the time when her murder took place and the appellant had all opportunity to commit the crime.

14. Another circumstance, which is sought to be relied on by the prosecution against the appellant is that after commission of crime, he had locked the house from outside and left the same after handing over key to witness Jignesh J. Panchal. Witness Jignesh J. Panchal P.W.3 Exh.10 has stated during the cross-examination by the learned A.P.P. that the appellant had not given key of the house to him, but had given to a neighbour residing in the same Apartments. He has further stated in his evidence that after purchasing vegetables, his mother had returned home and opened the door after collecting key from the neighbour. During the cross-examination by the learned A.P.P., the witness was confronted with his police statement, wherein he has stated that the appellant had given key of the house to him and he himself had opened the house and was watching T.V. kept in the first room of the Flat. As observed earlier, this witness was never cross-examined on behalf of the appellant. The question whether the appellant after locking the Flat from outside, had handed over key to witness Jignesh or neighbour, is hardly of any consequences, but the fact stands proved beyond reasonable doubt that the appellant had locked the Flat from outside and handed over key of the Flat and had gone

out. The fact that witness Jashodaben, P.W.2 having returned after purchasing vegetables and witness Jignesh P.W.2 watching T.V. had found Riddhi lying dead in the store room, is not disputed at all. It is nobody's case at all that Jayendrabhai who is father of the appellant, was present in the house when the incident took place. Thus, the circumstances proved clearly establish that the appellant was the only person in the Flat with deceased Riddhi and had ample opportunity to commit the crime in question.

15. The above discussion makes it clear that following facts have been proved by the prosecution beyond reasonable doubt : (i) the family of the appellant consisted of himself, his parents and his brother Jignesh and that the appellant was staying with his parents in Flat no.15 of Nandanvan Apartments situated near Bhavsar Hostel; (ii) Witness Jashodaben is the lawfully wedded wife of father of the appellant, but father of the appellant had illicit relations with witness Nayanaben, who had given birth to a child girl named Riddhi in the year 1991; (iii) Two months prior to the date of incident, witness Nayanaben had left child Riddhi at Nandanvan Flats in the custody and care of Jayendrabhai and Jashodaben; (iv) On the date of incident at the relevant time, deceased Riddhi,witness Jashodaben, witness Jignesh and the appellant were in the Flat, but witness Jashodaben had left the Flat for the purpose of purchasing vegetables; whereas witness Jignesh had left the Flat for playing and thus, the appellant was all alone in the Flat with the deceased; (v) At about 7.00 P.M. in the evening the appellant had locked the Flat from outside and handed over key of the Flat either to witness Jignesh or neighbour; (vi) witness Jashodaben, P.W.2 having returned after making purchase and witness Jignesh watching T.V. in the first room had found deceased Riddhi dead lying in the store room of the Flat. The circumstances proved are of a conclusive nature and tendency and they are such as to exclude every hypothesis but, the one proposed to be proved against the appellant. The chain of circumstances is complete and does not afford any reasonable ground for a conclusion, consistent with the innocence of the appellant. On consideration of total cummulative effect of all the proved facts, we are satisfied that in all human probability, the act of causing death of deceased Riddhi must have been done by the appellant. We notice that the Supreme Court in (1) Vasa Chandra Shekhar Rao v. Poona Satya Narayana (2000) 6 S.C.C.286 and (2) Geetha v. State of Karnataka (2000) 10 S.C.C. 72, while explaining law relating to circumstantial evidence, has, ruled that where

circumstances proved are put to the accused through his examination under Section 313 of the Code of Criminal Procedure and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. Here in this case the incriminating circumstances proved were put to the appellant and in his further statement recorded under Section 313, he has merely denied the same. Further as observed earlier, the appellant had filed written statement before the Sessions Court. In his written statement, the appellant claimed that the appellant was not present at the place where and at the time when the alleged incident took place and was on service from 9.00 A.M. to 12.00 noon and also from 1.00 P.M. to 9.00 P.M. at K.B. Medical Store, M.G.Market, Nagar Sheth no Vando, Gheekanta Road, Ahmedabad. Thus, the appellant pleaded alibi, but did not examine any one in support of his plea of alibi. There is no manner of doubt that a false plea of alibi was taken by the appellant and this may be called into aid only to lend assurance to the circumstances held to have been proved by this Court against the appellant. The evidence on record would indicate that the appellant was agitated because of illicit relations of his father Jayendrabhai with witness Nayanaben and birth of Riddhi who was at the relevant time, left in the care and custody of Jayendrabhai. The fact that the deceased died a homicidal death is proved beyond reasonable doubt and is not in dispute at all. In all human probability, the act of murder of deceased Riddhi must have been done by the appellant. The learned Judge has discussed circumstantial evidence appearing against the appellant and effect of the same in Paras 12 to 15 of the impugned judgment with which we concur.

16. In Rajendrabahadur Singh (supra), the learned Single Judge of the Madhya Pradesh High Court has taken the view that statement made by the accused while lodging F.I.R. cannot be used against him. Neither the learned City Sessions Judge, nor we have made use of any statement made by the appellant in his F.I.R. against him and, therefore, this decision is of no assistance to the appellant. In Jodha Khoda Rabari (supra), what is laid down by the Division Bench of the Gujarat High Court in Para-126 of the reported judgment is that the police statement of a witness has a very limited utility and it can be used only for the purpose of contradicting him, if he comes to be examined as a prosecution witness, but the police statement of a witness cannot be used as a substantive evidence. We may mention that initially the three star witnesses examined by the prosecution did not

support the prosecution. However, they were cross-examined by the learned A.P.P. after obtaining permission from the Court. Unfortunately for the appellant, they made damaging statements/admissions during their cross-examination by the learned A.P.P. and they were not cross-examined on behalf of the appellant at all. Where the evidence of a witness is allowed to go unchallenged with regard to a particular point, it may safely be accepted as true. It is true that the witnesses were confronted with their earlier police statements and contradictiions are proved through the evidence of the investigating officer, but, neither the learned City Sessions Judge, nor we have used the police statement of any witness as a substantive evidence and, therefore, this decision also does not help the appellant. Again, in State of Gujarat v. I.K.Shah (supra), a learned Single Judge of this Court has referred to principles governing a case based on circumstantial evidence. What is laid down therein is that before a person could be found guilty, each of the circumstances must be clearly established and the proved circumstances taken together must be such as reasonably to exclude the possibility of innocence of the accused. It is further highlighted in the said decision that the conclusion must be inconsistent with the innocence of the accused. In earlier part of this judgment, we have held that the circumstances which are sought to be pressed into service against the appellant are clearly established by the prosecution and the combined effect of proved circumstances is such that they do not exclude the possibility of innocence of the appellant. The conclusion drawn by us from the proved facts are consistent only with guilt of the accused and, therefore, the decision rendered by the learned Single Judge is also of no assistance to the appellant.

17. The contention that the appellant whilst deprived of the power of self-control by grave and sudden provocation had caused death of deceased Riddhi and, therefore, Exception-1 enumerated in Section 300 should be held to be applicable to the facts of the present case and the appellant should be punished for lesser offence punishable under Part-I of Section 304 of I.P.C.,is devoid of merits. Exception-1 enumerated in Section 300 I.P.C. provides that culpable homicidal is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or caused the death of any other person by mistake or accident. The above exception is subject to certain provisos, one of them is that the provocation must not have been sought or the

person who caused death of another should not have been voluntarily provoked as an excuse for killing or doing harm to any person. The evidence on record does not indicate that Riddhi, who was minor child aged 3 years, had offered any provocation to the appellant. Provocation, if at all, could have been either from Jayendrabhai, who is father of the appellant or Nayanaben with whom father of the appellant had illicit relations. The minor girl, who was fast asleep, had not offered any provocation to the appellant and, therefore, it is wrong to contend that whilst deprived of the power of self-control by grave and sudden provocation offered by minor child Riddhi, the appellant caused her death. In our view, the act of causing death of the deceased was done with the intention of causing her death and, therefore, the case is not governed by Exception-1 of Section 300 of the Indian Penal code and as there was no provocation from the deceased at all, the case would not be governed by Exception-1 enumerated in Section 300 I.P.C. Thus, the plea that Exception-1 enumerated in Section 300 is applicable to the facts of the present case and, therefore, it should be held that the appellant has committed lesser offence punishable under Part-I of Section 304 I.P.C. has no substance and is rejected hereby.

18. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt tha the appellant had caused death of deceased Riddhi, a child aged 3 years and is rightly convicted under section 302 I.P.C. Having regard to the totality of the facts and circumstances of the case, we do not find any substance in the appeal and the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned City Sessions Judge in the impugned judgment.

(J.M.Panchal,J.) (S.D.Dave,J.)

(patel)